

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1099

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

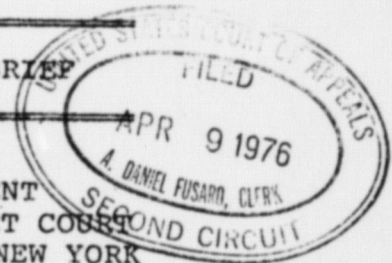
ERASMUS FLECHA,

Defendant-Appellant.

Docket No. 76-1099

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ERASMUS FLECHA
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,
Of Counsel.

CLOSED

TITLE OF CASE

ATTORNEYS

THE UNITED STATES

vs.

AUSA- T.R. PATTTSON

X JOSE ANCISAR PINEDA-MARIN,

X HUGO SUAREZ

X MOISES BANGUERA,

X ERNESTO SANTO GONZALEZ

X ERASMUS FLECHA

For Defendant: HUGO SUAREZ:

Court appointed counsel:

David Wm. McCarthy

1527 Franklin Ave

Mineola, NY 11501

Did import into USA with intent to distribute marijuana 220K 746-1616

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine, (FLECHA)	\$20000.00	10/26/73	Notice of Appeal (Suarez)		
Clerk,			No fee		
Marshal,		8/8/73	Notice of Appeal (Banguera)		
Attorney,			No fee		
Commissioner's Court,		8/3/73	Notice of Appeal (Ernesto Santos Gonzalez)		
Witnesses,			No fee		
		1/27/76	Notice of Appeal for (FLECHA)		

DATE	PROCEEDINGS
4-17-73	Before BARTELS J - Superseding Indictment filed.
4/19/73	Before WEINSTEIN, J.- Case called- Defts and counsel present-All defts arraigned and enter pleas of not guilty-Trial adjd to 4/24/73-Enl cont'd as to all defts-Motion by deft SUAREZ for daily copy of trial is granted-Defts motion to suppress to be heard on 4/24/73 before trial
4/24/73	Before WEINSTEIN, J.- Case called-Defts and counsel present- Deft's motion to suppress-Hearing ordered and begun-Hearing concluded-Deft's motion to suppress is denied-Trial cont'd to 4/25/73 at 2:00 P.M.
4/25/73	Before WEINSTEIN, J.- Case called- Defts and counsel present-Hearing ordered and begun-Wiretap material in brown envelope marked as court exhibit #6 and ordered sealed for the purpose of this litigation and not for others-Govt rests-Hearing cont'd without date-Case adjd to 4/26/ for trial.

63 CR 601

DATE	PROCEEDINGS
4/25/73	Stenographer's transcript of 4/24/73 filed.
4/26/73	Before WEINSTEIN, J. Case called Def's and counsel present Trial ordered and begun-Jurors selected and sworn Trial con'd to 4/27/73
4-27-73	Before WEINSTEIN J - Case called - Defts present with counsels - Trial resumed - trial continued to April 30, 1973.
4/30/73	Before WEINSTEIN, J.- Case called- Defts and counsel present- Trial resumed Trial cont'd to 5/1/73 at 10:30 A.M.
5/1/73	Before WEINSTEIN, J.- Case called-Defts and counsel present-Trial resumed Govt rests-Motion by deft SUAREZ to discharge juror #4 is granted-Defts motion for mistrial is denied- Motion by deft MARIN to dismiss the indictment is denied-Motion by deft BONGUERA to dismiss cts. 1 and 2 are granted and as to ct. 3-Motion by deft GONZALEZ to dismiss the indictment is granted Denied by deft FLECHA to dismiss the indictment is denied-All defts rest-All def motions previously made are renewed and denied-All counsels sum up for the respective defts individually-Mr. Pattison sums up for govt.-Court charges Jury retires to deliberate at 5:45 P.M.-Hearing on defts motion to suppress resumes-Trial cont'd to 5/2/73 at 2:00 P.M.
5/1/73	By WEINSTEIN, J.- Order of Sustenance filed.
5/2/73	Stenographer's transcript of pp. 83-607 filed.
5/2/73	Before WEINSTEIN, J.- Case called- Defts and counsels present-Trial resumed-Jury resumes deliberation at 2:00 P.M.-Jury returns and renders a verdict of guilty as to cts. 1, 2 and 3 as to defts MARIN, SUAREZ, GONZALEZ and FLECHA and guilty as to ct. 3 as to deft BANGUERA-Application by deft PINEDA for release pending bail is denied-Case adjd to 5/4/73 at 10:00 A. for motions and possible sentences-Govt's application to raise the bail of defts FLECHA and GONZALEZ is denied.
5/2/73	By WEINSTEIN, J.- Order of Sustenance filed.
5-3-73	Envelope ordered sealed and placed in vault by Judge Weinstein.
5/4/73	Before WEINSTEIN, J.- Case called- Defts and counsel present- Defts motion for immediate sentence without sentencing reports is denied-Defts motions res until day of sentence-Sentence adjd without date.
5/4/73	Stenographer's transcript of 5/2/73 filed.
5/5/73	Voucher for expert services filed (FLECHA)
5/8/73	By CAROCCIO, JAC. Order of Acceptance of Cash Bail filed. (A. NAPOLI)
5/8/73	Voucher for Expert Services filed.
5/26/73	Letter from chambers filed- re: voucher for expert services Before WEINSTEIN J - Case called - deft MOISES BANGUERA present- counsel 1 not present - sentence adjd to July 31, 1973. Deft FLECHA not present - counsel I. Novis present - deft reported in the hospital - sentence adjd to August 1, 1973 in Brooklyn at 10:00 am . Deft HUGO SUAREZ & counsel D. McCa

CRIMINAL DOCKET

DATE	PROCEEDINGS
	present. Defts motion to set aside the verdict is denied - deft sentenced to 4 years imprisonment plus 3 year special parole term on each of counts 1, 2 & 3 to run concurrently. Deft PINEDA-MARIN sentenced to imprisonment for 4 years plus 3 year special parole term on each of counts 1, 2 & 3 to run concurrently. Deft SANTO GONZALEZ & counsel J. Iovine By Mr. Horlick present - deft sentenced to imprisonment for 5 years plus 5 years special parole on each of counts 1, 2 & 3 to run concurrently - Stay of execution granted to August 9, 1973.
7-26-73	Judgment & Commitment filed - certified copies to Marshal (defts. GONZALEZ, PINEDA-MARIN & HUGU SUAREZ.)
7/31/73	Before, WEINSTEIN, J. - Case called- Deft and counsel Mr. Halliman present- Marganita Mensa sworn in as interpreter- Defts motion to retry the case on the basis of new evidence- Decision reserved Deft sentenced to 2 years imprisonment and 10 years special parole with directive that the deft be transported and incarcerated as if the sentence was under Y.C.A. (MOISES BANGUERA)
7/31/73	Judgment and Commitment filed- Certified copies to Marshal (Deft BANGUERA)
8/1/73	Before, WEINSTEIN, J. - Case called- Deft in hospital and letter dated 7/26/73 from U.S. Marshal, E.D.N.Y. marked (courts ex.1) Case adjd to 9/14/73 at 9:30 A.M.
8-3-73	Notice of Appeal filed (PINEDA-MARIN) no fee (and deft SUAREZ)
8-3-73	Docket entries and duplicate of Notice mailed to C of A (PINEDA-MARIN) and deft (SUAREZ)
8/6/73	Letter received from chambers from Atty Jay Honlick filed re: GONZALES
8/6/73	Judgment and Commitment retd and filed. Executed. Defts SUAREZ, BANGUERA, PINEDA-MARIN filed.
8-8-73	Notice of Motion filed, ret. 9-4-73, as to deft Banguera for vacating the verdict and judgment or in lieu of that a hearing on the question of whether or not the Govt has complied with its obligation, etc.
8-8-73	Before Weinstein J - Case called on application for stay of surrender pending appeal (deft Gonzalez) application granted pending appeal - bail \$10,000 contd - deft to report once a week to Asst U.S. Atty. Pattison.
8-8-73	Notice of Appeal filed without fee (BANGUERA) So Ordered by Weinstein, J.
8-8-73	Docket entries and duplicate of Notice mailed to C of A (BANGUERA)

DATE	PROCEEDINGS
8/9/73	EX Petition for Writ of Habeas Corpus Ad Testificandum filed. (KOCH)
8/9/73	By MISHLER, CH.J.- Writ issued, ret. 10/10/73
8/10/73	By, WEINSTEIN, J.- Ordered that the argument will be heard on 9/21/73 at 10:15 A.M. (AUSA and counsel notified as ordered) (BANGUERA)
8/14/73	Govt's affidavit in opposition filed (BANGUERA)
8/3/73	Notice of Appeal filed.
8/3/73	Duplicate of Notice of Appeal and docket entries mailed to the C. of A. (DEFT GONZALEZ)
9/4/73	Stenographers Transcript dated 7/26/73 filed
9-4-73	Before Weinstein J - case called & motion adjd to Sept. 21, 1973.
9/12/73	Record on appeal certified and ^{handed to} mailed by Sandy Sadowitz ^{for delivery} to C of A
9/13/73	Stenographers Transcript listed on index as missing mailed to Court of Appeals
9/14/73	Before WEINSTEIN, J.- Cse called- Deft FLECHA and counsel not present-Bench Warrant ordered-Sentence set for Sept. 17, 1973
9-17-73	Before WEINSTEIN J - Case called - Deft FLECHA not present - reported a fugitive - deft sentenced in absentia to imprisonment for 5 years plus parole of 2 years and fined \$15,000 on each of counts 1 and 2 to run concurrently and sentenced to imprisonment for a period of 5 years plus special parole of 2 years and fined \$15,000 on count 3, to run consecutively with counts 1 and 2 for a total fine of \$30,000. the 2 years special parole term on count 3 is to run concurrently with the 2 years special parole term imposed on counts 1 and 2 - defts motion for bail pending appeal is denied - govts motion for forfeiture of bail is granted.
9-17-73	Judgment and Commitment filed - certified copies to Marshal (FLECHA)
9-17-73	Stenographers transcript filed dated July 26, 1973 (GONZALEZ)
9-17-73	Voucher for Expert Services filed (deft Pineda-Marin)
9/18/73	Bench Warrant issued (FLECHA)
9/18/73	Acknowledgment received from Court of Appeals for receipt of Record on appeal ^{filed} (PINEDA-MARIN AND ERNESTO GONZALEZ)
9-18-73	Record on Appeal certified and handed to S. Sadowitz for delivery to C of A (MARIN & GONZALEZ)
9/24/73	Acknowledgment received from Court of Appeals and filed for record on appeal (PINEDA-MARIN AND GONZALEZ)
9/21/73	Before WEINSTEIN, J.- Case called- Deft Banguera not present- Deft's counsel present- Post Trial Brady motion argued- Decision reserved- Briefs to be submitted within 2 weeks for govt

DATE	PROCEEDINGS
10/1/73	Notice of appeal filed (FLECHA)
10/1/73	Docket entries and duplicate of Notice of Appeal mailed to court of appeals (FLECHA)
10/2/73	Writ retd and filed- Executed (FLECHA)
10/2/73	Certified copy of Judgment and Commitment retd and filed- Deft delivered to Federal Detention Headquarters (FLECHA)
10/2/73	Stenographers Transcript dated April 19, 1973 filed & 4-13-73
10/2/73	3 Stenographers Transcript dated May 4, 1973 and July 26, 1973, filed
10-3-73	Voucher for Expert Services filed (Hugo Suarez)
10-9-73	Govts Memo of Law filed.
10-9-73	Copy of Govts affidavit in oppositon filed. (Flecha)
10-9-73	Before WEINSTEIN J - Case called - motion by all defts for an order vacating the verdict and Judgment, etc. Hearing set for Oct. 16, 1973.
10/10/73	By WEINSTEIN, J.- Order filed approving of late filing of notice of appeal for deft Erasmus Flecha - and letter from Atty Irving Novis filed
10/12/73	Stenographers Transcript dated 10/9/73 ffiled
10/14/73	<i>Voucher for Compensation of Counsel files (Flecha)</i>
10/16/73	Before WEINSTEIN, J.- Case called- Deft Gonzalez present- All other defts not present- All counsels present- Defts motion for a new trial- Hearing ordered and begun- Name of informant ordered sealed and placed in vault- Court rules that informants name need not be revealed- Hearing concluded- Defts motion for a new trial denied- Mr. Hallinan to file notice of appeal in forma pauperis for Deft Banguera
10-15-73	By WEINSTEIN J - Order filed that the bail bond as to deft FLECHA in the amount of \$5,000 filed by Ruben Pacheco is declared forfeited.
10/16/73	Notice of appeal filed (for order ^{of} denying defts motion for a new trial) (Pineda-marin)
10/16/73	Docket entries and duplicate of Notice of appeal mailed to C of A (Pineda-Marin)
10/16/73	By WEINSTEIN, J.- Order filed authorizing voucher for expert services (PINEDA-MARIN)
10-23-73	Notice of Appeal filed (MOISES BANGUERA) (from order denying new trial)
10-23-73	Notice of Apeal filed (SANTO GONZALEZ) " " " " "
10-23-73	Docket entries and duplicate of Notice mailed to C of A for defts BANGUERA & SANTO GONZALEZ.

DATE	PROCEEDINGS
10/24/73	Letter dated 10/19/73 from Lawrence Spirn, esq. and letter dated 10/19/73 from William Epstein, esq. filed re: ruling on suppression hearing-
10/24/73	By WEINSTEIN, J.- Order filed that there will be a hearing on the issue stated in letters from L. Spirn and W. Epstein, esqs. on 11/9/73, Counsel will make available all documents pertinent to proceedings (counsel notified as ordered) (Order on bottom of letters)
10-25-73	Stenographers transcript dated Oct. 16, 1973 filed (Marin)
10-25-73	Voucher for Expert Services filed (Pineda-Marin)
10/26/73	Notice of appeal from order denying new trial filed (SUAREZ)
10/26/73	Docket entries and duplicate of notice of appeal mailed to Court of Appeals (SUAREZ)
11/5/73	Stenographers Transcript dated 4/26/73 filed
11-5-73	Letter of Oct. 31, 1973 from counsel Joseph Hallinan Jr filed re deft Vanquera (received from Chambers)
11-5-73	By Weinstein J - Order filed that Clerk of Court will send required form etc. Form sent to Judge Weinstein for signing.
11-9-73	Before WEINSTEIN J - Case called - defts not present - counsels present Conference for further information as to wire-tap issue held and concluded - Hearing set for Nov. 20, 1973 at 9:45 am.
11-13-73	By WEINSTEIN J - Memorandum and Order filed re transcripts, etc. Pages of the transcript (as indicated in Memo) shall be made available to attorneys for defts, either by opening them for inspection or by supplying xerox copies. Clerk to notify attys and send a copy of Memo and Order (parties notified)
11-16-73	Voucher for expert services filed (SUAREZ)
11-20-73	Voucher for expert services filed (PINEDA-MARIN)
11-20-73	Before WEINSTEIN J - Case called - hearing to set aside verdict - Agony Henry Torres called and sworn as witness for Govt - hearing concluded - defts motion to set aside the verdict is denied. So Ordered.
11/23/73	Voucher for Compensation filed (for deft H. Suarez)
11-28-73	Notice of motion for reduction of sentence filed (Pineda-Marin) (Pro Se)
11-28-73	By WEINSTEIN, J.- Memorandum and Order filed denying deft Pineda-Marin's motion for a reduction of sentence (copy sent to deft as ordered)
12-17-73	Memorandum to Robert Lipscher from Judge Weinstein, with letter to Chambers from Administrative Office and copy of voucher filed
12-26-73	Voucher for compensation of counsel filed (PINEDA-MARIN, SUAREZ)
12-26-73	Petition for writ of habeas corpus ad prosequendum filed (FLECHA)
12-26-73	By WEINSTEIN, J.- Writ issued, ret. 1-2-74 (FLECHA)

DATE	PROCEEDINGS
1-7-74	Memorandum dated Dec. 28, 1973 filed received from Chambers re deft Flecha (from Robert Lipscher of the C of A re CJA #20etc)
1-9-74	Brief for deft. HUGO SUAREZ filed.
1-9-74	Writ ret'd and filed - Executed. (FLECHA)
1-9-74	Before WEINSTEIN J - case called on motion for reduction of sentence as to deft. FLECHA - motion granted - deft sentenced to 4 years and 2 years/ ^{special} probation.
1-9-74	Amended Judgment and Order of Probation filed - certified copies to Marshal and probation.
1-15-74	Certified copy of Judgment & Commitment ret'd and filed - deft FLECHA del. to Federal Detention Headquarters.
1-16-74	Voucher for payment of counsel filed (FLECHA)
1-17-74	2nd Supplemental Index to Record on Appeal handed to S. Sadowitz of Legal Aid for delivery to the C of A (PINEDA-MARIN)
1-21-74	Acknowledgment received from the Court of Appeals for receipt of Index to Second Supplemental Record on Appeal (PINEDA-MARIN)
2-14-74	Judgment received from the C of A filed withdrawing appeal as to deft ERASMUS FLECHA.
3-28-74	Certified copy of Judgment received from court of appeals affirming the orders and judgments of the district court (JN)
4-11-74	Notice of motion for reduction of sentence filed (Pineda-Marin)
4-11-74	By WEINSTEIN J - Order filed that the motion pursuant to Rule 35 (Pineda-Marin) will be heard on April 26, 1974
4-26-74	at 9:30 am. The deft shall not be produced - (parties notified)
4-26-74	Before WEINSTEIN J - case called - deft Pineda Marin not present - counsel Joanna Seybert of Legal Aid present - defts motion for reduction of sentence - motion denied - so Ordered.
6-3-74	Record on appeal received from court of appeals - acknowledgment mailed mailed to court of appeals for receipt of file
6-24-74	Voucher for compensation of counsel filed (FLECHA)
6-28-74	Order received from Supreme Court and filed denying deft Suarez's petition for a writ of certiorari
7-15-74	Notice of motion filed for reduction of sentence imposed (Suarez) returnable 7-22-74
7-22-74	Before WEINSTEIN, J. - Case called - Deft not present - Counsel present - Motion for reduction of sentence argued and denied - So Ordered (SUAREZ)
	(OVER)

DATE	PROCEEDINGS
7-25-74	By WEINSTEIN, J.- Order of forfeiture and judgment filed that the bail bond of deft ERASMUS FLECHA, in the amount of \$5,000 is declared forfeited- Ordered that judgment be entered in favor of the U.S. against the deft Flecha and against Ruben Pachco as surety, Ordered that the clerk of the court pay out of the Registry of this court any cash deposited in the Registry, in accordance with the appearance bond, etc.
8-1-74	Amended Order of Forfeiture and Judgment filed (FLECHA)
8-7-74	Notice of Appeal filed as to deft Suarez from denial of motion for reduction of sentence.
8-7-74	Docket entries and duplicate of Notice mailed to the C of A (SUAREZ)
9-6-74	Certified copy of Judgment and Commitment retd and filed- deft delivered to Federal Detention Headquarters (GONZALEZ)
11/11/74	Certified copy of judgment received from Supreme court and filed denying deft GONZALEZ'S petition for certiorari
12/27/74	Letter from deft Gonzalez for reduction of sentence filed
12/27/74	Copy of letter to deft Gonzalez from Law Clerk of Judge Weinstein filed re: above motion
1-22-75	Govts affidavit filed in response to motion of deft Gonzalez for reduction of sentence (forwarded to Chambers)
1-30-75	Order received from the Court of Appeals that the appeal from the Judgment of the U.S. District Court is dismissed (Suarez)
12/10/75	Stenographers Transcript dated 1/9/74 filed
12/10/75	Stenographer's transcript of 1/27/73 filed.
1/23/76	Before WEINSTEIN, J.- Case called- deft FLECHA and counsel Edward Kelly of Legal Aid present- The conviction having been set aside (75C1772)- deft is sentenced to imprisonment for a period of 4 years and a special parole term of 2 years- credit to be given for time served
1/23/76	Judgment and Commitment filed- certified copies to Marshal
1-27-76	Notice of Appeal filed (no fee - Flecha)
1-27-76	Docket entries and duplicate of Notice mailed to the Court of Appeals. (Flecha)

A TRUE COPY	
DATE	2/1/76
BY	<i>[Signature]</i>

BEST COPY AVAILABLE

EJB:TRP:cd
F.#731720

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
★ APR 17 1973 ★

UNITED STATES OF AMERICA

-X
TIME A.M.
P.M.

-against-

SUPERSEDING
INDICTMENT

JOSE ANCISAR PINEDA-MARIN,
HUGO SUAREZ,
MOISES BANGUERA,
ERNESTO SANTO GONZALEZ,
ERASMUS FLECHA,

Cr. No.
(T. 21, U.S.C. §952(a),
960(a)(1), §963 and 841(a)(1); T. 18, U.S.C.
§2.)

Defendants.

THE GRAND JURY CHARGES:

73 CR 391

COUNT ONE

On or about and between the 25th day of March, 1973 and the 26th day of March, 1973, both dates being approximate and inclusive, within the Eastern District of New York, the defendants JOSE ANCISAR PINEDA-MARIN, HUGO SUAREZ, MOISES BANGUERA, ERNESTO SANTO GONZALEZ, and ERASMUS FLECHA, did knowingly and intentionally import approximately two hundred eighty seven (287) pounds of marihuana, a Schedule I controlled substance, into the United States from Colombia, in violation of Title 21, United States Code, Sections 960(a)(1), and 952(a), and Title 18, United States Code, Section 2.

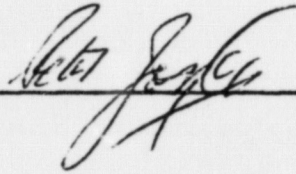
COUNT TWO

On or about and between the 25th day of March, 1973, and the 26th day of March, 1973, both dates being approximate and inclusive, within the Eastern District of New York, the defendants JOSE ANCISAR PINEDA-MARIN, HUGO SUAREZ, MOISES BANGUERA, ERNESTO SANTO GONZALEZ, and ERASMUS FLECHA, did knowingly and unlawfully possess with intent to distribute approximately two hundred eighty seven (287) pounds of marihuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18 United States Code, Section 2.

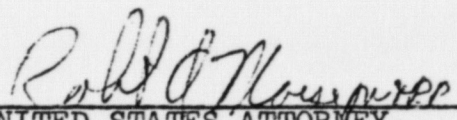
COUNT THREE

On or about and between the 25th day of March, 1973 and the 26th day of March, 1973, both dates being approximate and inclusive, within the Eastern District of New York, the defendants JOSE ANCISAR PINEDA-MARIN, HUGO SUAREZ, MOISES BANGUERA, ERNESTO SANTO GONZALEZ, and ERASMUS FLECHA, knowingly, unlawfully and intentionally did conspire to import into the United States from Columbia approximately two hundred eighty seven (287) pounds of marihuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Sections 952 and 960(a)(1), and to knowingly and intentionally possess with intent to distribute approximately two hundred eighty seven (287) pounds of marihuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), all in violation of Title 21, United States Code, Section 963 and 846.

A TRUE BILL.



FOREMAN.



UNITED STATES ATTORNEY.

PAGINATION AS IN ORIGINAL COPY

CHARGE OF THE COURT

THE COURT: Ladies and gentlemen of the jury:

It is my function now to instruct you with respect to matters of the law. It is your duty as jurors to follow these instructions. You are the sole judges of the facts. The fact that the prosecution was brought in the name of the United States does not entitle the government to any greater consideration than any other litigant is entitled to get. Nobody is entitled to sympathy or favor in this court.

Remember, I told you an indictment is merely a matter of bringing a case before the Court, it is not evidence of guilt, and is entitled to no weight at all in your determination. These defendants have pleaded not guilty, and that means the government has the burden of proving guilt beyond a reasonable doubt with respect to every element of the crime each defendant is charged with committing. A defendant does not have to prove his innocence. A defendant need not submit any

1
2 evidence at all. On the contrary, he is
3 presumed to be innocent. A defendant need
4 not testify because of this same reason.
5 No inference adverse to a defendant may
6 be made because he does not testify. He is
7 presumed to be innocent and the government
8 has the burden of proving him guilty beyond
9 a reasonable doubt. A presumption of innocence
10 is a meaningful and substantial right which
11 is afforded to every defendant in a criminal
12 prosecution. This presumption of innocence
13 remains with a defendant throughout the
14 trial, and is to be considered by you in
15 your deliberations.

16 A reasonable doubt means a doubt
17 sufficient to cause a prudent person to
18 hesitate to act in the most important affairs
19 of his life. Reasonable doubt may result from
20 the evidence produced, and may also result
21 from the failure to produce evidence.

22 Finding a person to be guilty of a
23 felony, and subjecting him to the possibility
24 of serious penalties, is quite serious, as
25 you will understand. You will consider the

1
2 seriousness of the possibilities here in
3 determining whether you have a reasonable
4 doubt. Nevertheless, if you are convinced
5 beyond a reasonable doubt of the defendant's
6 guilt, you should not be swayed by sympathy,
7 but you should find him guilty.

8 The law does not require certainty,
9 because only those present at an event can
10 feel certain about what happened, and even
11 they can be wrong.

12 Of course, none of us, you or I or
13 the attorneys, were present.

14 Sometimes in the course of the charge
15 I use the phrase, "find beyond a reasonable
16 doubt." Sometimes I just use the word, "find,"
17 but I want you to know that wherever I say,
18 "find," it means "beyond a reasonable doubt."

19 You are going to have to rely upon
20 your own common sense and experience in
21 evaluating what you are told about and what
22 you see in the way of exhibits here. A number
23 of exhibits or a number of witnesses is not
24 necessarily determinative of the truth.

25 Your recollection will govern, but if you
have any questions about specific testimony,

1
2 or about specific evidence, you can send
3 in a note and I will send in whatever you
4 like. Try to be precise, if you want testi-
5 mony reread. I do not want to waste a lot
6 of time rereading unnecessary testimony.

7 Each of these four defendants is
8 charged with three counts, or crimes, except
9 for one of them. That one is charged only with
10 one count. That is Banguera.

11 Each count must be separately con-
12 sidered by you with respect to each defend-
13 ant, so in effect, there are 13 separate
14 trials being considered here. You can find
15 any defendant guilty or not guilty of any
16 particular charge. Each one of these defend-
17 ants, each charge has to be considered
18 separately.

19 Now, with respect to a situation
20 where more than one person may be involved,
21 the guilt of the defendant may be established
22 without proof that he personally did any act
23 constituting the offense charged.

24 Eighteen United States Code, Section 2,
25 provides:

1
2 "Whoever commits an offense against
3 the United States or aids, abets, counsels,
4 commands, induces or procures its commission,
5 is punishable as a principal."

6 That is if he did everything else.

7 "Whoever willfully causes an act to
8 be done which is directly performed by him
9 or another, would be an offense against the
10 United States, is punishable as a principal."

11 In other words, every person who will-
12 fully participates in the commission of a
13 crime may be found guilty of that offense.

14 Now, by "intentionally," and "know-
15 ingly," we mean something very specific in
16 law. A person does not knowingly do an act
17 if his action resulted from a mistake, negli-
18 gence, or any other innocent reason.

19 If a defendat, therefore, did not
20 know that there was marijuana in the bales,
21 he could not be guilty.

22 An act is intentional if the defendant
23 acts voluntarily and knowingly and with the
24 specific intent to do something the law for-
25 bids -- that is to say, with a bad purpose,

1
2 either to disobey or to disregard the law.

3 That means you have to look into
4 the state of mind of these defendants, and
5 you have to infer from the circumstances, as
6 revealed from the evidence in the case.

7 The details in the indictment are
8 approximations, but you have to find that
9 they conform generally to what was charged.

10 Now, count one reads as follows:

11 "On or about and between the 25th
12 day of March, 1973, and the 26th day of March,
13 1973, the defendants, Jose Ancisar Pineda-Marin--
14 that is the gentleman in the green shirt --
15 Hugo Suarez, that is the gentleman sitting
16 next to him; Ernesto Santo Gonzalez, the man
17 in the white suit, and Erasmus Flecha, the
18 man in the dark jacket sitting next to him,
19 did knowingly and intentionally import
20 approximately 287 pounds of marijuana, a
21 Schedule I controlled substance, into the
22 United States from Colombia, in violation of
23 law. That is the importation count. That
24 charges a violation of Section 952(a) and
25 960(a)(1), of Title 21 of the Code, which
reads:

1
2 "It shall be unlawful to import
3 into the United States from anyplace outside
4 thereof, any controlled substance in Schedule 1
5 of Chapter 1 of this Chapter."

6 Marijuana is a Schedule I control sub-
7 stance.

8 Section 960(a) provides:

9 "Any person who contrary to Section 952,
10 knowingly or intentionally imports a controlled
11 substance" shall be punishable by a felony.

12 There are two elements to that crime:

13 The defendant imported the marijuana or
14 assisted in its importation, and

15 Second, that a defendant acted knowingly
16 and intentionally, as I have explained those
17 terms to you.

18 (continued on following page)
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2 Now, the second count is that the same
3 people, Jose Ancisar Pineda-Marin, Hugo Suarez,
4 Ernesto Santo Gonzales, and Erasmus Flecha, on
5 the same dates, did knowingly and unlawfully
6 possess with intent to distribute the same amount
7 of marijuana.

8 That constitutes, if it is true, a violation
9 of Section 841 (a) (1) of Title 21 of the United
10 States Code which says:

11 "It shall be unlawful for any person
12 knowingly or intentionally to possess with intent
13 to distribute a controlled substance."

14 Marijuana is a scheduled controlled substance.

15 There are three elements to this crime:

16 First, the defendant did in fact possess
17 marijuana or assisted in its possession by another
18 defendant.

19 Second, in order to find the defendant
20 guilty of violating this section you must find
21 that he knowingly or intentionally possessed
22 the marijuana,

23 Third, you must find that the defendant
24 intended to distribute the marijuana. Distribute
25 means to deliver and deliver has a simple clear

1
2 meaning. It means to transfer. If they intended
3 to throw it over the ship's rail in order to have
4 somebody else pick it up, that would be a delivery
5 or distribution.

6 Count three of the indictment is the
7 conspiracy count. The charge is that: " On
8 the same dates, Hose Ancisar Pineda-Marin, Hugo
9 Suarez, Ernesto Santo Gonzales, Erasmus Flecha
10 and now the fifth of the defendants Moises
11 Banguera, knowingly, unlawfully and intentionally
12 did conspire to import into the United States
13 from Colombia approximately 287 pounds of
14 marijuana, and knowingly possessed with the
15 intent to distribute approximately 287 pounds
16 of marijuana, a schedule one controlled substance,
17 etc."

18 A conspiracy of this kind constitutes a
19 violation of Section 846 and 963 of Title 21 of
20 the United States Code which reads:

21 "Any person who conspires to commit any
22 offense defined in this subchapter is guilty of
23 the crime of conspiracy" and under these sections
24 the elements of the crime are:

25 First, that there be two or more persons

involved.

Second, that they wilfully and knowingly conspire or agree, and

Third, that they conspire to commit an unlawful act.

The unlawful act obviously being the importation and possession of the marijuana.

Let me explain those elements of the conspiracy count. You must find beyond a reasonable doubt that the defendants wilfully conspired or agreed that one of them or his agent would import marijuana or possess marijuana with the intent to distribute it. If you do not find that there was such an agreement, then you cannot find a conspiracy existed. You must first consider whether there was a knowing and wilful agreement among at least two defendants. It is not necessary that the persons charged met together and entered into an express and formal agreement, or that they stated orally or in writing what the scheme was or how it was to be effected. It is sufficient to show that they came to a mutual understanding to accomplish the unlawful act.

The Government must show beyond a reasonable

doubt that the conspiracy was knowingly formed and that the defendant wilfully participated in the unlawful crime with the intent to advance or further some object or purpose of the conspiracy. That agreement may be inferred from the circumstances and the conduct of the parties, since ordinarily a conspiracy is characterized by secrecy and they do not enter into it openly. Nevertheless, suspicion alone cannot be a substitute for evidence.

To be a member of a conspiracy the defendant does not have to know all the details or participate in all of them. Each member of the conspiracy may perform separate and distinct acts. It is necessary, however, that the Government prove beyond a reasonable doubt that a defendant was aware of the common purpose and that the common purpose was criminal in nature and that the defendant was a willing and knowing participant with the intent to advance the purposes of the conspiracy.

The third element you must find is that the conspiracy was one to commit an unlawful act and I have already told you that the importation

1
2 of marijuana or the possession of marijuana,
3 with intent to distribute, is an illegal act
4 and I have analyzed the nature of that for you.

5 A difficult part of your job is to
6 evaluate the credibility of the witnesses you
7 heard. You can consider the relationship of
8 the witness to the Government, his bias or his
9 interest in the outcome of the case, his manner
10 while he was testifying, he candor, his intelligence
11 as you observed it and the extent to which he
12 has been corroborated by other evidence.

13 If you think a witness has wilfully
14 sworn falsely before you with respect to a material
15 element, you can ignore his testimony completely.
16 But, of course, he may have been mistaken or
17 lied with respect to some of what he said and
18 be accurate with respect to other elements. Do
19 not give any greater weight or credence to the
20 testimony of a witness merely because he is an
21 agent of the Government. His testimony is to be
22 evaluated in the same way you would evaluate the
23 testimony of any other witness.

24 You are entitled to have your own opinions,
25 but you should exchange views with your fellow

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2 jurors and listen carefully to each other. If
3 you are convinced that another opinion is correct,
4 you should change your opinion. But your
5 opinion ultimately must be your own. Any verdict
6 must be unanimous. Your oaths sum up your duty
7 and that is, without fear or favor to any man,
8 you will well and truly try the issues before
9 these parties according to the evidence given
10 to you in Court and the laws of the United
11 States.

12 You may take as long as you wish to
13 deliberate. If you do not finish tonight, you
14 may come back tomorrow. No rush, take as much
15 time as you want.

16 May I see you at the side bar?

17 (The following transpired at the side bar.)

18 THE COURT: Any objections?

19 MR. NOVIS: In view of the fact that
20 Mr. Pattison said that they did not have a camera
21 because of the flash, I think that you ought to
22 charge the jury that there are cameras that
23 could have taken a picture without any illumination.

24 THE COURT: I am not a camera bug.

25 MR. NOVIS: He admits it.

1
2 THE COURT: Denied.

3 MR. BRACKLEY: Do they have to deliberate
4 now?

5 THE COURT: Yes.

6 Any objections?

7 MRS. SEYBERT: No.

8 MR. HALLINAN: No.

9 MR. PATTISON: No, your Honor.

10 THE COURT: I made up this little chart.
11 Do you want to give it to the jury to help them?

12 MR. PATTISON: I do not know whether or
13 not to.

14 THE COURT: There are five defendants and
15 the names may be unfamiliar to them.

16 MR. HALLINAN: I have no objection.

17 MR. NOVIS: I have no objection.

18 MR. PATTISON: I think not. It could be-
19 come compartmentalized thinking about it.

20 MR. MC CARTHY: No objection.

21 THE COURT: Mark it into evidence.

22 MR. NOVIS: There are cameras that can be
23 used without flashes in the dark.

24 THE COURT: You should have brought in
25 testimony of it. The case is closed.

(The following transpired in open Court.)

THE CLERK: Marked Court's exhibit 12
in evidence.

THE COURT: Ladies and gentlemen, I want
the two alternates to leave. Thank you very much.
Do not discuss the case until we are finished.
You are discharged. You may go home.

(Alternates leave.)

THE COURT: I made up this little chart
which shows the names and the various charges
which I can give to the foreman. It may assist
you.

Swear the marshall.

(Marshall sworn.)

THE COURT: Ladies and gentlemen, retire
and consider your verdict. The marshall will
give you paper and pencil. If you have any phone
calls just write them out and the marshall will
take care of it.

(Jury leaves courtroom.)

THE COURT: Gentlemen, would you get some
agreement on the exhibits. Put them in order
so if they ask for anything, we can put them in.

MR. PATTISON: Yes, your Honor.

1
2 MR. MC CARTHY: With respect to Defendant's
3 exhibit A, we have to cover the back.

4 THE COURT: There is nothing on the back
5 that seems to be of any significance. Let it
6 go.

7 MR. MC CARTHY: No problem.

8 I also have a couple of questions.

9 First of all, I respectfully inquire of
10 the Court whether your Honor has received the
11 first portion of the wiretaps that Assistant
12 District Attorney La Russo was supposed to
13 deposit with the Court.

14 THE COURT: I have not.

15 Would the Government attorney investigate
16 that and see if that could be expedited?

17 MR. PATTISON: I did not catch the last
18 part?

19 THE COURT: The first part of the wiretaps
20 we do not have.

21 MR. PATTISON: Yes.

22 MR. MC CARTHY: Secondly, if your Honor
23 recalls we had a question as to the motion to
24 suppress in view of the testimony of Agent
25 Grieco with respect to actions he took in response

1
2 to an anonymous phone call. We have not resolved
3 that.

4 THE COURT: I understand what you want
5 me to do about it. Do you want me to call any
6 witnesses?

7 MR. MC CARTHY: I don't want to call
8 witnesses. There should be some testimony.

9 THE COURT: He testified he does not
10 know anything about it.

11 MR. MC CARTHY: That is information which
12 was the result of what was marked Government's
13 exhibit 4.

14 THE COURT: I know. You know all the
15 leads. Tell the Government who you want and we
16 will hold a hearing.

17 MR. BRACKLEY: He testified in the Grand
18 Jury that it was an anonymous phone call.

19 THE COURT: What does he know about it?
20 It wasn't his information. If you want to call
21 Agent Grieco, we will hear him.

22 MR. BRACKLEY: It will take a minute.

23 THE COURT: Call him.

24 MR. PATTISON: Now? A note may come out
25 and I think --

1
2 THE COURT: I can handle it.

3 Mr. Grieco, would you mind taking the
4 stand?

5 MR. MC CARTHY: There is one other thing.
6 I know the marshalls have been sworn. I have
7 seen a couple of the jurors walking out in the
8 halls during recesses. I wish we could make
9 sure they are not walking around. My client is
10 in jail --

11 THE COURT: No juror will walk around in
12 the hall after the marshalls have sworn. No
13 juror leaves that room without my permission,
14 unless he is carried out.

15 Excuse me, I will be back in a moment.

16 (Recess taken.)

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18 (continued on next page)

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2 J O H N G R I E C O, having previously been duly sworn,
3 resumes the stand and testifies further as
4 follows:

5 THE CLERK: You have been previously
6 sworn. You are still under oath.

7 THE COURT: Who wants to examine the
8 agent?

9 MR. MCCARTHY: I will, Judge.

10 DIRECT EXAMINATION

11 BY MR. MCCARTHY:

12 Q Agent Grieco, I believe you testified at the
13 motion to suppress that your surveillance of the ship and
14 the operations as a result of the surveillance of the
15 ship were based upon the information contained in
16 Government's Exhibit 4; is that correct?

17 A Yes.

18 Q And solely upon that information; is that
19 correct?

20 A Memorandum.

21 Q I show you your testimony in the grand jury,
22 page 9, the top portion of the page.

23 I ask you, does that refresh your recollection
24 as to whether you had any other information that led you to
25 place the surveillance upon the ship?

Grieco-direct

A I had no other information, other than the memo, and if you would like me to explain this paragraph to you, I will.

Q Yes, please.

A Approximately eight months ago, either the ADRIANA or the ANNA MOLINA (phonetic), a vessel of the same line, had docked at State Pier. My office was called in the morning by the customs inspector, that there were many objects floating in the water up the Cohanus Channel, and in fact out in the harbor.

The men from my office went down and obtained a small boat, just for the expedient search, and came up with piles or bundles of marijuana floating in the water.

That afternoon or that morning, and all afternoon, we searched, my office did, with a Coast Guard boat, and rounded up somewhere in the vicinity of 50 packages that were just floating in the water.

Late that afternoon I had received a call from my office, anonymous, mentioning possibly that a diver was going to be used. It ended right there.

The evening of March 26, when I heard that the diver, or person, had gone in the water, it refreshed my memory of an operation where divers would be used. And that's the reference to this answer.

3 1
2 Q In other words, your testimony is that that
3 anonymous phone call took place approximately seven months
4 prior to the time that the ship was in port; is that right?

5 A Right. No relationship to this case.

6 Q Were there any other anonymous phone calls
7 with regards to the FRANCISCO MIGUEL or any other ships of
8 the Calva Pores Line, say, after the first of this year?

9 A I'm not aware of any, and I did not receive any.

10 MR. MCCARTHY: I have no further
11 questions.

12 MR. NOVIS: Your Honor, in view of
13 the fact that your Honor is not taking
14 judicial notice of the fact that there are
15 cameras that can photograph in the nighttime,
16 without any illumination, I want to ask
17 this witness if he knows of his own knowledge
18 that such cameras do exist.

19 THE COURT: What difference does it
20 make? The evidence is closed.

21 MR. PATRISON: I object.

22 MR. NOVIS: Yes, but then you might
23 still instruct the jury that the statement
24 made by the prosecutor is not correct.

25 THE COURT: Your motion to reopen the

1
2 evidence is denied. It's too late.

3 MR. NOVIS: Exception.

4 THE COURT: Anything further, gentlemen
5 or madame?

6 MR. DRACKLEY: Can I just see the
7 minutes for a second?

8 MR. PATTISON: I have no questions.

9 THE CLERK: Your Honor, we marked the
10 requests for telephone calls as Court Exhibit 13.
11 The request for food is part of Court's
12 Exhibit 13.

13 (So marked.)

14 THE COURT: No further evidence. The
15 suppression hearing is closed. Motion to
16 suppress on the grounds of anonymous phone
17 calls is denied.

18 (Recess.)

19 (continued on following page)
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2 THE CLERK: Jury note marked Court's
3 Exhibit 14.

4 THE COURT: Have you examined the last
5 note, which is now marked Court's Exhibit 14?
6 What is your advice?

7 MR. PATTISON: I would ask that the
8 Court read Title XXI, Section --

9 THE COURT: Title XXI, Section 951,
10 the term importation means any bringing into
11 or introduction of such article into any
12 area.

13 MR. PATTISON: It is further defined,
14 customs area -- importing into the customs
15 area from a place outside the area. I think
16 it is 952.

17 THE COURT: Import into the customs
18 territory.

19 What is the defendant's advice?

20 MR. MCCARTHY: Your Honor, as far as
21 Mr. Suarez is concerned, may we have the statute
22 read, but I would ask that the importation be
23 defined to mean importation into the United
24 States, and not the customs territory, in view
25 of the indictment, which says the United States

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2
3 and does not mention the customs territory.

4 MR. BRACKLEY: I do not have any
5 objection to the definition given to the
6 jury. I think they have a chart with three
7 columns. The first one says, "Importation,"
8 et cetera. They ought to be told the gist of
9 the first is importation, the gist of the
10 second -- that is what the heading represents.

11 THE COURT: Get the dictionary, please.

12 MR. NOVIS: May it please the Court--

13 THE COURT: Importation means bringing
14 into a country. Here it means bringing into
15 the United States. Anyone helping to transport
16 goods from outside the three-mile limit into
17 the dock area will be importing. The act of
18 importation continues until the object is
19 taken off the boat.

20 MR. PATTISON: No, your Honor, it
21 goes even further --

22 THE COURT: We do not have to worry
23 about that.

24 MR. PATTISON: I think we do.

25 MR. NOVIS: I object to that definition
on the grounds it does not include the words,

3 1 "knowing it is marijuana."

2
3 THE COURT: That is not what they have
4 asked for. Let us concentrate on one thing.

5 Do you have any objection to the
6 definition of importation?

7 MR. NOVIS: Yes.

8 THE COURT: What is it?

9 MR. NOVIS: I believe there can be no
10 definition of importation without specifying,
11 "knowing that it is contraband or marijuana."

12 THE COURT: All right, I will add that.
13 Anything else?

14 Bring in the jury.

15 (Jury present.)

16 THE COURT: The question you posed is,
17 "What constitutes importation?"

18 Importation means bringing into a
19 country. Here it means bringing into the
20 United States. Anyone hoping to transport
21 goods from outside the three-mile limit --
22 that is the area three miles from the
23 coast -- into the dock area by ship, would
24 be importing. The act of importation continues
25 until the object is taken off the boat. The

3A

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importation would have been with knowledge,

3

that it is marijuana. Thank you.

4

(Jury leaves courtroom.)

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(continued on following page)

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(The following occurred at 7:30 o'clock p.m.)

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4 (The following occurred in the absence
of the jury)

5 THE COURT: We will start at two o'clock
6 tomorrow. I can't be here in the morning.

7 MR. PATTISON: Two o'clock, your
8 Honor.

9 THE COURT: We have a note.

10 Bring in the jury.

11 Mark it. Just says they want to leave
12 at 7:30.

13 THE CLERK: Court Exhibit 15, Jury's
14 note.

15 (Document referred to, being a jury
16 note, was received and marked Court's Exhibit 15.)

17 (The jury thereupon returned to the
18 courtroom at 7:35 o'clock p.m.)

19 THE COURT: All right, ladies and
20 gentlemen, you are released for the evening.
21 Will you be here at two o'clock tomorrow? I
22 can't be here in the morning. And I prefer
23 to be here while you are deliberating.

24 Two o'clock. Do not discuss the case
25 with anybody at home, or anybody here until

1
2 all of you are assembled together.

3 Good night. Pleasant evening.

4 Do any of you want any help getting
5 to the subway or anything? Do you want an
6 escort from the marshal, or something like
7 that?

8 JUROR NUMBER ELEVEN: We are all going
9 in the same direction.

10 THE COURT: All right. If you want any
11 help, let me know.

12 Good night. I will see you tomorrow.

13 (The jury thereupon retired from the
14 courtroom.)

15 (Thereupon at 7:40 o'clock p.m., an
16 adjournment was taken to Wednesday, May 2nd,
17 1973, at two o'clock p.m.)

18 * * * * *

PAGINATION AS IN ORIGINAL COPY

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2 (2:30 p.m.)

3 THE COURT: Mark the note.

4 THE CLERK: Court Exhibit 16.

5 THE COURT: I understand that you have
6 all agreed that the jury wants pages 321 to
7 353 read excluding the side bar from 348 to 349;
8 is that correct?

9 MR. PATTISON: Your Honor, there is one
10 other point we have learned since. The first
11 half of this deals with the men on the end of
12 the actual pier. But then the agent further
13 testified to observations made on the actual
14 ship itself.

15 In other words, Suarez meeting on the
16 ship. The bulk of the cross-examination dealt
17 with that also, what he saw on the actual ship.

18 Now, the note does not seem to call for
19 that portion of that agent's testimony.

20 THE COURT: Let's read what you agreed
21 on and see if that satisfies them.

22 MR. PATTISON: That includes more than
23 what they ask for.

24 THE COURT: Please give me line and page
25 numbers.

1
2 MR. PATTISON: Mr. McCarthy and I couldn't
3 make that out.

4 MR. MCCARTHY: The note seems ambiguous
5 about that. I will check the record.

6 THE COURT: What do you want read?

7 MR. MCCARTHY: I don't want anything
8 unless they are asking for it.

9 THE COURT: Excuse me. We have a note
10 here. What do you wish me to tell the jury in
11 response to this note?

12 MR. MCCARTHY: The way I read the note --

13 THE COURT: I ask you what do you want
14 me to read to the jury in response to their note.
15 I want specific pages and line numbers.

16 MR. MCCARTHY: I can't tell if they are
17 asking about my client or not.

18 THE COURT: What do you want me to do
19 with response to the note?

20 MR. MCCARTHY: I would ask them whether
21 they want the testimony with regard to the people
22 on the ship.

23 THE COURT: I am going to answer on the
24 basis of the note. What does the Government
25 want?

1
2 MR. PATTISON: I would ask, my copy of
3 the record was here a second ago, I believe. One
4 of the other lawyers has it. I would ask for
5 that part of the record beginning at page 321
6 going up to where I asked the agent about whether
7 he observed anyone on the actual ship itself.
8 Because prior to that it deals --

9 THE COURT: What page and what line?

10 MR. PATTISON: I believe the Court may
11 have a copy of the record which I can't find.

12 From 321 up to line 22 of page 330.

13 MR. HALLINAN: Excluding all the colloquy.

14 MR. PATTISON: And the only cross --

15 THE COURT: I don't want explanations, I
16 just want page and line numbers from you so I
17 know what you want.

18 MR. PATTISON: From 321 to 330 and then --

19 THE COURT: Line 20 on 330?

20 MR. PATTISON: Yes. And then page 349
21 from line 19 to page 353.

22 THE COURT: Line what?

23 MR. PATTISON: All of the actual page.

24 THE COURT: All right. Do any defense
25 counsel want any other portion by line and page

1
2 read?

3 MR. HALLINAN: No, I think that answers
4 the question.

5 MR. MCCARTHY: I don't.

6 THE COURT: Very good. Bring in the jury.
7 The reporter will read those materials
8 as requested by counsel.

9 (The jury is in the jury box.)

10 THE COURT: Mark this new note we just
11 received from the jury as it walked in.

12 THE CLERK: Court Exhibit 17.

13 THE COURT: It says, "Suarez testimony."
14 I don't understand what you want.

15 THE FOREMAN: Agent Grieco's testimony
16 concerning Mr. Suarez.

17 THE COURT: Let me read the other note.
18 The note says, "May we have the testimony of
19 the two men at end of pier. One crouched
20 (tugboat testimony and grain elevator testimony)."

21 Now, I am now going to direct the repor-
22 ter to read what we think you want. When you
23 have heard enough read, let us know. Then we will
24 release you and look for the testimony you say
25 you want of Grieco respecting Suarez and we will

1
2 call you in again.

3 The reporter will commence to read.

4 (At this time the reporter commenced
5 reading the designated portion.)

6 THE FOREMAN: The agent was on the tug-
7 boat --

8 MR. HALLINAN: May we approach the side
9 bar?

10 THE COURT: I wish you would. I want
11 exactly what counsel wishes in this respect.

12 (The following took place at side bar.)

13 MR. PATTISON: Line 21 is what I asked
14 for.

15 MR. MCCARTHY: The guy on the tugboat was --

16 MR. PATTISON: The two men --

17 MR. HALLINAN: We are confused.

18 MR. PATTISON: May we just say to them
19 now, or would the Court say that Agent Weinschenk
20 was a witness about the men on the pier. Agent
21 Maurer was on the tugboat and saw the men coming
22 through.

23 MR. HALLINAN: Don't add that.

24 MR. PATTISON: Do they want either --

25 THE COURT: Weinschenk was on the boat?

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2 MR. PATTISON: No, in the grain elevator
3 and he saw the men crouching on the pier.

4 (The following took place in open court.)

5 THE COURT: Do you want Agent Weinschenk's
6 testimony? He was the one that was in the grain
7 elevator and watched them crouching.

8 THE FOREMAN: Yes.

9 THE COURT: All right.

10 (The following took place at side bar.)

11 MR. PATTISON: 321 through 330.

12 THE COURT: It is 322, line 13. Mr. Weinschenk's
13 testimony beginning on page 322, line 13 is
14 apparently what counsel have agreed on.

15 (The following took place in open court.)

16 THE COURT: The reporter will commence
17 reading.

18 (The reporter complied with the instruc-
19 tions of the Court.)

20 THE FOREMAN: That is enough, your Honor.

21 THE COURT: Can you allow the jury to
22 retire for a few moments?

23 MR. PATTISON: Yes.

24 (The jury left the courtroom.)

25 THE COURT: Why don't you look at the

1
2 transcript together.

3 MR. PATTISON: Your Honor --

4 THE COURT: Where is Mr. McCarthy? Where
5 are the attorneys and the Interpreter? I haven't
6 left the bench.

7 MR. MCCARTHY: I apologize for leaving.
8 I don't have a set of minutes.

9 THE COURT: They are right here. You
10 have a set right there.

11 MR. PATTISON: Your Honor, there was
12 one part of the testimony left out. The testi-
13 mony about --

14 THE COURT: The jury was satisfied. Let's
15 move on.

16 MR. PATTISON: It is a very critical
17 part and I am sure they want all of it.

18 THE COURT: The jury told me they were
19 satisfied. I want to move on. I want Mr. Grieco's
20 testimony with respect to Suarez.

21 MR. PATTISON: Very well. I will look
22 for it.

23 THE COURT: For the record, tell me what
24 it is.

25 MR. PATTISON: Just page 346 through line 12,

1
2 to page 347, line 15. About just a half page.

3 The direct examination --

4 MR. HALLINAN: No, that direct was improper.

5 THE COURT: Do you object?

6 MR. HALLINAN: Yes, they said they had
7 enough.

8 THE COURT: Let's get to the Gillico testi-
9 mony respecting Suarez.

10 MR. PATTISON: This will take a while.

11 THE COURT: Take your time, I will wait
12 here while you do it.

13 MR. PATTISON: Do you have the 27th?

14 MR. MCCARTHY: Yes.

15 (Pause.)

16 MR. PATTISON: Do you want to read them
17 off?

18 MR. MCCARTHY: This is page 172, lines
19 5 through 21. Page 189, line 15 to page 190,
20 line 4. Page 190, line 15 to 24. Page 199 --

21 MR. PATTISON: 194.

22 MR. MCCARTHY: 194, to line 22. To 196,
23 line 14.

24 Page 200, line 21 to page 202, line 13.

25 Page 204, line 25 to page 206, line 9.

Page 208, line 15 to page 210, line 5.

MR. PATTISON: Your Honor, may I at this time be heard?

THE COURT: Yes.

MR. PATTISON: I would again ask the Court that in light of the jury's first note when the Court asked me for page and line numbers, I, through my own fault, left out those 12 lines which I asked the Court about later. The jury indicated that they had heard enough only after that which had been read, read up to them, stops being read --

MR. HALLINAN: I object. It was improper redirect.

MR. PATTISON: The Court ruled upon it.

THE COURT: Get the record.

MR. HALLINAN: In the record --

MR. PATTISON: It is page --

MR. HALLINAN: I object. These are the questions he left out on direct, try to play cute, and then --

MR. PATTISON: Page 346, line 12 to page 347, line 15.

MR. HALLINAN: Would your Honor read it?

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2 It is brief, and you can see.

3 MR. PATTISON: I think it is critical in
4 light of their note.

5 MR. HALLINAN: It is exactly what was said
6 on direct. It is an unfair re-emphasis.

7 MR. PATTISON: No, it is not.

8 THE COURT: Let me have the transcript
9 between 172 and 210 so I may mark it for the
10 reporter.

11 Mark this further note.

12 THE CLERK: Court Exhibit 18.

13 MR. PATTISON: Does the Court have a
14 copy -- from 175, yes, all right.

15 THE COURT: Show this to counsel while I
16 mark the transcript.

17 THE CLERK: Can the attorneys come up.

18 THE COURT: What is it marked?

19 THE CLERK: Court Exhibit 18, your Honor.

20 THE COURT: I am handing to the reporter
21 material beginning on page 172 with a clip at
22 the top of the page and marking thereafter
23 where to begin and where to stop.

24 MR. PATTISON: Your Honor, Mr. McCarthy
25 has just located one other part of the record.

1
2 MR. MCCARTHY: Page 199, line 19.

3 THE COURT: To where?

4 MR. MCCARTHY: To page 200, line 21, which
5 your Honor has as the beginning of another
6 passage.

7 In other words, that passage would be
8 page 199, line 18 to page 202, line 13.

9 THE COURT: Yes.

10 MR. MCCARTHY: Thank you.

11 THE COURT: What is the definition you
12 want me to give of possession?

13 MR. PATTISON: All I would ask for is the
14 two actual types, actual possession and construc-
15 tive possession.

16 THE COURT: The law recognizes two kinds
17 of possession; actual possession and constructive
18 possession. A person who knowingly has direct
19 physical control over a thing, at a given time,
20 is then in actual possession of it. This is true
21 even if the physical control is only momentary.
22 A person who, although not in actual possession,
23 knowingly has both the power and the intention,
24 at a given time, to exercise dominion or control
25 over a thing, either directly or through another

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2 person or persons, is then in constructive posses-
3 sion of it. The law recognizes also that posses-
4 sion may be sole or joint. If one person alone
5 has actual or constructive possession of a thing,
6 possession is sole. If two or more persons share
7 actual or constructive possession of a thing,
8 possession is joint.

9 MR. PATTISON: That would be adequate for
10 me.

11 MR. HALLINAN: Yes.

12 MR. NOVIS: What was the last word?

13 THE COURT: "Joint."

14 MR. MCCARTHY: I have no objection, your
15 Honor.

16 THE COURT: Bring in the jury.

17 MR. PATTISON: May I ask you, please,
18 again to read those 12 lines? I think if it
19 were not read, I am sure if I had asked for those
20 lines --

21 THE COURT: I know. I would have surely
22 read it.

23 MR. PATTISON: Thank you.

24 THE COURT: Bring in the jury.

25 (The jury is in the jury box.)

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2 THE COURT: We will read to you the testi-
3 mony we located with respect to Suarez. Do you
4 want me first to read some other testimony that
5 one of the counsel has found connected with the
6 prior testimony or have you had enough of that?

7 THE FOREMAN: You mean the prior one?

8 THE COURT: Yes.

9 THE FOREMAN: We have had enough of that.

10 THE COURT: Then read the testimony I just
11 indicated.

12 (The reporter complied.)

13 THE COURT: Is that enough?

14 THE FOREMAN: Yes.

15 THE COURT: You asked about the definition
16 of possession.

17 "The law recognizes two kinds of possession;
18 actual possession and constructive possession.
19 A person who knowingly has direct physical control
20 over a thing, at a given time, is then in actual
21 possession of it. This is true even if the
22 physical control is only momentary.

23 "A person who, although not in actual
24 possession, knowingly has both the power and the
25 intention, at a given time, to exercise dominion

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2 or control over a thing, either directly or through
3 another person or persons, is then in constructive
4 possession of it.

5 "The law recognizes also that possession
6 may be sole or joint. If one person alone has
7 actual or constructive possession of a thing,
8 possession is sole. If two or more persons
9 share actual or constructive possession of a
10 thing, possession is joint."

11 If you have a truckload of cartons, let's
12 say, and I call the trucker and I say: Those
13 are the cartons I want delivered, and I have the
14 power to deliver them, I would be in possession
15 of them even though I wasn't actually there
16 present because I would have the power to exer-
17 cise dominion or control over them.

18 If the driver and the assistant knew they
19 were the cartons there and knew what was in
20 there, each one of them would also have posses-
21 sion and control. If there were people unload-
22 ing them and they knew what was in there, they
23 also would have possession and control.

24 You can have a considerable number in
25 possession or control over a variety of times over

1
2 the same cartons.

3 If there is somebody helping the truck
4 back in, and he knows what is in them and he says:
5 Back in there, or don't back way down here, he
6 would also be in possession and control of them.

7 He has to know what is in them. And he
8 has to have some power, either himself or with
9 somebody else, to move them around.

10 Any objections or exceptions? Do you
11 gentlemen and members want to make any objections
12 at side bar?

13 MR. MCCARTHY: No, your Honor.

14 MR. PATTISON: No.

15 THE COURT: You may retire then and con-
16 sider your verdict.

17 (The jury left the courtroom.)

18 A At this time we brought Mr. Flecha back to the same
19 location where Mr. Gonzales was. In the meantime other
20 officers had brought Mr. Suarez and Mr. Pineda to the
21 same location, and also the other agents, Mr. Banguera,
22 I believe his name is; they had brought him over there.
23 We had them all over there at this time.

24 Q O.K. At this time was anything said? Did
25 you overhear anybody say anything?

1
2 A We were standing there. The captain was sent for
3 to identify these five individuals. He came down. He
4 identified them, the two, as crew members, the other three
5 he didn't know who they were.

6 We had them standing in line. I was standing
7 next to Mr. Gonzales and Mr. Flecha. Mr. Muniz was standing
8 next to me, and somebody was talking to the captain at
9 this time, and Mr. Gonzales made a statement in Spanish,
10 in which I am fluent, I am a native of Puerto Rico, that
11 is my home --

12 Q What did he say?

13 A Mr. Gonzales said, in fact, translated in English,
14 he said, "Why so much excitement? If we are caught, we
15 are caught."

16 (Continued on the next page.)
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Q Did you actually ask him anything? Was this an actual answer to any question?

A It wasn't any answer to my question. He appeared to be talking to Mr. Flecha, who was next to him at the time.

Q Any well.

MR. HALLINAN: Your Honor, at this time I am going to ask an instruction from the Court that the statement is not binding at all on the defendant Banguera.

MR. MCCARTHY: Same with regard to Mr. Suarez.

MRS. SEYBERT: I also join in that on behalf of Mr. Pineda.

THE COURT: Granted.

MR. NOVIS: I join in that application, your Honor.

THE COURT: As to whom?

MR. NOVIS: As to Mr. Flecha.

THE COURT: Where was Mr. Flecha standing when Gonzales said it?

THE WITNESS: He was right next to him, sir.

THE COURT: How far away?

THE WITNESS: Oh, six inches, twelve inches.

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Cabrera - direct

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THE COURT: Denied as to Mr. Flecha.

CERTIFICATE OF SERVICE

April 9, 1976

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

Nathan Hilberman